Able Aluminum Co., Inc. *and* National Organization of Industrial Trade Unions, Local 72, IPEU. Case 29–CA–18715

August 23, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

Upon a charge filed November 25, 1994, and an amended charge filed December 19, 1994, by the National Organization of Industrial Trade Unions, Local 72, IPEU, the General Counsel of the National Labor Relations Board issued a complaint on January 5, 1995, against Able Aluminum Co., Inc. (the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.[1] Counsel for the General Counsel, by letter dated April 11, 1995, advised the Respondent that if an answer to the complaint was not filed by April 25, 1995, counsel for the General Counsel would file a Motion for Summary Judgment. On April 20, 1995, Curtis Arditi, president of the Respondent, wrote to counsel for the General Counsel advising her that ''we have an agreement with the Union for a payment system to bring these accounts up to date.'' The Respondent neither filed an answer to the complaint nor requested any extension of time to file an answer. On February 5, 1996, Daniel Lasky, administrator of the National Organization of Industrial Trade Unions Insurance Trust Fund and Pension Fund, advised counsel for the General Counsel that the Respondent has not been complying with the alleged payment agreement reached between the Union and the Respondent. By letter dated February 12, 1996, counsel for the General Counsel informed the Respondent that its April 20, 1995 letter did not qualify as an answer, and advised the Respondent that unless an answer was received by February 29, 1996, a Motion for Summary Judgment would be filed.

On May 6, 1996, the General Counsel filed a Motion for Summary Judgment. On May 8, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] The charge, amended charge, complaint, and the General Counsel's letters of April 11, 1995, and February 12, 1996, were sent by certified mail, but the Respondent did not accept delivery and the documents were returned by the United States Postal Service as ''refused.'' Failure or refusal to accept delivery of certified mail will not be allowed to defeat the purposes of the Act. *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986).

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that an answer to a complaint shall specifically admit, deny, or explain each of the facts alleged in the complaint unless the respondent is without knowledge, in which case it shall so state. Section 102.20 further provides that ''any allegation in the complaint not specifically denied or explained in an answer filed . . . shall be deemed to be admitted to be true and shall be so found by the Board.''

The Respondent's April 20, 1995 letter does not constitute an adequate answer to the complaint under the Board's Rules because it does not specifically admit, deny, or explain each of the allegations in the complaint.[2] Further, the Respondent's letter merely alleges the existence of a payment agreement with the Union ''to bring these accounts up to date.'' It is well established that, under Section 8(a)(5) and (1) and Section 8(d) of the Act, an employer that is party to an existing collective-bargaining agreement is obligated to first obtain the consent of the union before modifying the terms and conditions of employment established by that agreement. *Nick Robillotto, Inc.*, 292 NLRB 1279 (1989). Therefore, the Respondent's claim that it reached agreement with the Union on a schedule for paying the delinquent amounts, even if proven, does not constitute an adequate defense to an allegation that the Respondent has violated Section 8(a)(5) and (1) by failing to abide by provisions of its collective-bargaining agreement. Accordingly, we find that the Respondent's letter has raised no issues warranting a hearing.

In the absence of good cause being shown for the failure to file an adequate answer, and in the absence of any material issues warranting a hearing, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, with its principal office and place of business located at 131-31 Merrick Boulevard, Springfield Gardens, New York (Springfield facility), has been engaged in the manufacture and distribution of vinyl and aluminum products. During the year preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, sold and shipped from its Springfield facility vinyl and aluminum products and related materials valued in excess of $50,000 directly to points outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union

[2] See, e.g., *Jay-Lor Drains Maintenance*, 300 NLRB 464 (1990).

is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit and the Union's Representative Status*

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production, maintenance, shipping and receiving employees, plant clericals and truck drivers, employed at Respondent's Springfield facility, excluding office clericals, foremen, watchmen, guards and supervisors as defined in the Act.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit employees, and has been recognized as such representative by the Respondent. Recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period from April 24, 1993, to April 25, 1996. At all material times, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

B. *The Refusal to Bargain*

The collective-bargaining agreement described above contains, inter alia, provisions set forth in schedule ''A'' which require the Respondent to make periodic monthly contributions to the Union's Insurance Trust Fund and Individual Account Pension Plan (Funds) on behalf of its unit employees, and dues checkoff provisions set forth in section VII which require the Respondent to deduct dues and fees from the wages of its unit employees pursuant to valid dues authorizations and remit the checked off dues and fees to the Union. These provisions relate to rates of pay, wages, hours of employment, and other terms and conditions of employment of unit employees and are mandatory subjects for the purpose of collective bargaining.

Since about May 28, 1994, the Respondent has failed and refused to make monthly contributions to the Funds as required by the collective-bargaining agreement. The Respondent has engaged in this conduct unilaterally, without the consent of the Union, and in breach of the collective-bargaining agreement. We find that by this conduct the Respondent has violated Section 8(a)(5) and (1) of the Act.

Since about May 28, 1994, the Respondent has failed and refused to remit to the Union dues and fees which it deducted from its employees' wages pursuant to valid dues-checkoff authorizations. Until April 25, 1996, the Respondent engaged in this conduct unilaterally, without the Union's consent, and in breach of its collective-bargaining agreement. We find that by failing to remit the checked off dues and fees to the Union from May 28, 1994, to April 25, 1996, the Respondent has violated Section 8(a)(5) and (1) of the Act.

C. *The Postcontract Expiration Dues-Checkoff Violation*

Although it is well settled that an employer's obligation to abide by the terms of a dues-checkoff provision ceases with the expiration of the contract and the employer is no longer obligated to honor the employees' checkoff authorizations,[3] once a respondent honors the employees' checkoff authorizations and deducts the dues from the employees' paychecks it is not entitled to keep the checked off dues for itself.[4] Rather, if the sums are deducted by the employer pursuant to valid checkoff authorizations that have not expired or been revoked, those sums represent dues and fees to which the union is entitled. By signing checkoff authorizations, the employees have expressed their desire to have certain sums deducted from their paychecks and paid by the employer to a labor organization. By such action the employees have exercised their Section 7 rights to join and assist a labor organization. We find that an employer interferes with, restrains, or coerces employees in the exercise of their Section 7 rights to join and assist a labor organization in violation of Section 8(a)(1) of the Act where it retains for itself dues that it checked off from employees' paychecks after the expiration of a collective-bargaining agreement. See *Talaco Communications, Inc*., 321 NLRB 762 (1996). Thus, if the Respondent failed to remit to the Union any sums it deducted from the employees' paychecks after April 25, 1996, pursuant to valid unexpired and unrevoked checkoff authorizations, the Respondent's failure to remit those sums to the Union in accordance with the expressed wishes of the employees violated Section 8(a)(1) of the Act. To the extent that the employees' checkoff authorizations may have expired or been revoked at the expiration of the collective-bargaining agreement, the Respondent's retention of the checked off sums and failure to return those sums to the employees violated Section 8(a)(1). See *Talaco Communications, Inc*., supra. Accordingly, we leave to the compliance stage of this proceeding the determination of whether any sums deducted and retained by the Respondent in violation of Section 8(a)(1) after the expiration of the collective-bargaining

[3] *J. R. Simplot Co*., 311 NLRB 572 (1993); *Bethlehem Steel Co*., 136 NLRB 1500 (1962), enfd. in relevant part 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[4] *Independent Stave Co*., 248 NLRB 219, 221 (1980).

agreement were deducted pursuant to valid checkoff authorizations that were not expired or revoked. If the dues and fees were deducted pursuant to valid checkoff authorizations that have not expired or been revoked, the checked off sums shall be remitted to the Union as set forth in the remedy section of this decision. If the dues and fees were deducted pursuant to checkoff authorizations that have expired or been revoked, those sums shall be returned to the employees.

CONCLUSIONS OF LAW

1. By failing to make contractually required monthly contributions to the Union's Insurance Trust Fund and Individual Account Pension Plan, and by failing to remit checked off union dues and fees to the Union prior to expiration of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By failing to remit to the Union and/or the employees any checked off union dues and fees it has deducted and retained after expiration of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to remit to the Union dues and fees that were deducted from the pay of unit employees pursuant to valid dues-checkoff authorizations before the expiration of the collective-bargaining agreement, we shall order the Respondent to remit such withheld dues and fees to the Union as required by the agreement, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Having found that the Respondent has violated Section 8(a)(1) by retaining for itself any dues and fees deducted from the pay of unit employees after the expiration of the collective-bargaining agreement, the Respondent shall be ordered to remit those sums to the Union, provided that the dues and fees were deducted pursuant to valid, unexpired and unrevoked dues-checkoff authorizations. If the dues and fees were deducted pursuant to expired or revoked checkoff authorizations, the Respondent shall return any withheld dues and fees to the employees, with interest as prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required contributions to the Union's Insurance Trust Fund and Individual Account Pension Plan, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the Funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.[5]

ORDER[6]

The National Labor Relations Board orders that the Respondent, Able Aluminum Co., Inc., Springfield Gardens, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees by failing and refusing to remit to the Union dues and fees checked off pursuant to valid checkoff authorizations prior to the expiration of the collective-bargaining agreement, and to make required contributions to the Union's Insurance Trust Fund and Individual Account Pension Plan.

(b) Interfering with, restraining, and coercing its employees in the exercise of their rights to join and assist a labor organization, by failing to remit to the Union dues and fees checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to the employees' valid, unexpired, and unrevoked checkoff authorizations, or by deducting and failing to return to the employees dues and fees checked off after the expiration of the collective-bargaining agreement, if the dues and fees were deducted pursuant to expired or revoked checkoff authorizations.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remit to the Union all dues and fees it deducted from employees' pay pursuant to valid dues-checkoff

[5] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[6] The Order conforms to the new standard language recently set forth in *Indian Hills Care Center*, 321 NLRB 144 (1996).

authorizations prior to the expiration of the collective-bargaining agreement, in the manner set forth in the remedy section of the decision.

(b) Remit to the Union, or to the employees, as determined at the compliance stage of this proceeding, all dues and fees it deducted from employees' pay after the expiration of the collective-bargaining agreement, in the manner set forth in the remedy section of the decision.

(c) Remit the delinquent Union Insurance Trust Fund and Individual Account Pension Plan contributions, including any additional amounts due the Funds, and reimburse the unit employees for any expenses ensuing from the Respondent's failure to make the required payments, in the manner set forth in the remedy section of the decision.

(d) On request, bargain with National Organization of Industrial Trade Unions, Local 72, IPEU as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production, maintenance, shipping and receiving employees, plant clericals and truck drivers, employed at Respondent's Springfield facility, excluding office clericals, foremen, watchmen, guards and supervisors as defined in the Act.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Springfield Gardens, New York, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 25, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the Union as the exclusive collective-bargaining representative of our unit employees by failing and refusing to remit to the Union dues and fees we deducted pursuant to valid checkoff authorizations prior to the expiration of the collective-bargaining agreement, and to remit required contributions to the Union's Insurance Trust Fund and Individual Account Pension Plan.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your rights to join and assist a labor organization, by failing to remit to the Union dues and fees checked off after the expiration of the collective-bargaining agreement, if the dues and fees were deducted pursuant to employees' valid, unexpired, and unrevoked checkoff authorizations, or by deducting and failing to return to the employees dues and fees checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to expired or revoked checkoff authorizations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remit to the Union all dues and fees we deducted from employees' pay pursuant to valid dues-checkoff authorizations prior to the expiration of the collective-bargaining agreement, with interest.

WE WILL remit to the Union, or to the employees, as determined at the compliance stage of this proceeding, any dues and fees we deducted from employees' pay after the expiration of the collective-bargaining agreement, with interest.

WE WILL remit the delinquent Union Insurance Trust Fund and Individual Account Pension Plan contributions, including any additional amounts due the Funds, and WE WILL reimburse the unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL, on request, bargain with National Organization of Industrial Trade Unions, Local 72, IPEU as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

All full-time and regular part-time production, maintenance, shipping and receiving employees, plant clericals and truck drivers, employed at our Springfield facility, excluding office clericals, foremen, watchmen, guards and supervisors as defined in the Act.

ABLE ALUMINUM CO., INC.